IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

VICKY MANN,
Plaintiff

V. NO. 1:93CV107-B-D

CITY OF TUPELO, TUPELO-LEE HUMANE SOCIETY, SUNSHINE MILLS, INC., AND SUZIE O'NEAL,
Defendants

**MEMORANDUM OPINION**

This cause comes before the court on the motion for summary judgment filed by defendants City of Tupelo [City] and Sunshine Mills, Inc. [Sunshine Mills] and a motion for summary judgment filed by defendants O'Neal and Tupelo-Lee Humane Society [Humane Society]. The court has duly considered the parties' memoranda and exhibits and is ready to rule.

## I. Introduction

This cause was filed against the City pursuant to 42 U.S.C. § 1983 and against the remaining defendants pursuant to supplemental jurisdiction over related claims under 28 U.S.C. § 1367(a). The claims arise out of the plaintiff's alleged wrongful termination and publicity of the circumstances surrounding her alleged termination. The plaintiff alleges that the City and the Humane Society violated her substantive and procedural due process rights and liberty interests under the Fourteenth Amendment and are liable for invasion of privacy, breach of contract and breach of duty of good faith. The plaintiff alleges additional state claims of

defamation and intentional or negligent infliction of emotional distress against all the defendants. The plaintiff further alleges state claims of malicious prosecution and menace against Sunshine Mills and interference with economic relations against the Humane Society, O'Neal and Sunshine Mills.

The defendants object to the allegation of violation of the plaintiff's liberty interest specifically raised for the first time in opposition to the instant motions after the close of discovery. The defendants contend that the claim was not properly pled and therefore not preserved. However, the alleged liberty interest falls under the due process clause of the Fourteenth Amendment invoked in the complaint. The substantive and procedural due process claim alleged in the complaint encompasses both the plaintiff's alleged property interest in employment and liberty interest in future employment. See Connecticut General Life Ins. Co. v. Universal Ins. Co., 838 F.2d 612, 622 (1st Cir. 1988) (plaintiff not required to explicitly plead alternative theory of recovery as long as underlying facts are alleged). In addition, the plaintiff testified in her deposition, taken during the discovery period of this cause, about her job-hunting efforts and the adverse impact of the news coverage on her job interviews. Accordingly, the court will consider the due process claims with respect to the plaintiff's alleged liberty interest as well as her alleged property interest.

## II. Facts

The following facts are stipulated in the pretrial order. On October 14, 1991 the plaintiff completed an employment application for the position of animal control officer with the City. On approximately July 4, 1992, the plaintiff was hired as an animal control officer at the Humane Society through order of the Board of Aldermen of the City. The plaintiff was employed by the Humane Society for approximately one week prior to July 4, 1992, until her paperwork was complete with the City. The City paid for and provided the plaintiff's salary and benefits. The plaintiff had an indefinite term of employment and was paid every two weeks. The City of Tupelo Employee Handbook was furnished to the plaintiff. Defendant O'Neal, the plaintiff's immediate supervisor, was an employee of both the Humane Society and the City.

For several years, defendant Sunshine Mills had donated dog food to the Humane Society for its use in feeding animals maintained at its animal shelter. The Humane Society had an extensive oversupply of the dog food donated by Sunshine Mills. The donated dog food did not meet Sunshine Mills' standards for sale to the public and Sunshine Mills never intended that the donated dog food be sold to the public by anyone. The plaintiff sold donated dog food at a flea market and donated dog food was sold at Lynn's Discount Grocery owned by the plaintiff's mother. Sunshine Mills had no prior knowledge that its donated dog food was

being sold to the public.

On November 12, 1992, the plaintiff was questioned by the Tupelo Police Department about the selling of the donated dog food. O'Neal told the detectives that the plaintiff had not stolen the dog food. The detectives determined that the plaintiff was the source of at least some of the dog food sold at her mother's store and at the flea market. The plaintiff became separated from her employment on or about November 13, 1992.

## III. Law

### A. Breach of Employment Contract

It is a question of fact as to whether the plaintiff quit her employment or was terminated. Assuming arguendo that the plaintiff was terminated, the City and the Humane Society argue that the plaintiff, as an at will employee, has no cause of action for breach of contract. Mississippi adheres to the common law rule that "where there is no employment contract (or where there is a contract which does not specify the term of the worker's employment), the relation may be terminated at will by either party." Perry v. Sears, Roebuck & Co., 508 So.2d 1086, 1088 (Miss. 1987); Shaw v. Burchfield, 481 So.2d 247 (Miss. 1985). Under the employment at will doctrine, "either the employer or the employee may have a good reason, a wrong reason, or no reason for terminating the employment contract." Kelly v. Mississippi Valley Gas. Co., 397 So.2d 874, 874-75 (Miss. 1981). The public policy

exception does not apply in this cause. McArn v. Allied Bruce-Terminix Co., 626 So.2d 603, 604 (Miss. 1993) (narrow public policy exception exists when employer discharges employee for refusing to participate in illegal act or for reporting employer's illegal acts).

It is undisputed that the plaintiff was not employed under a contract for a definite term or for an annual salary. The plaintiff contends that the City's handbook created an implied employment contract whereby the City was obligated to discharge for cause only. The Mississippi Supreme Court has held that language in a personnel manual "given to all employees" can create contractual obligations or become "part of the contract." Bobbitt v. The Orchard, LTD., 603 So.2d 356, 361 (Miss. 1992). The plaintiff relies on the following language in the City's handbook:

> **EMPLOYEE RELATIONS POLICY STATEMENT**
> The Mayor and Board of Aldermen of Tupelo finds and declares:
>
> . . . .
>
> That the City recognizes its obligations to treat all employees fairly at all times;
> That continuation of employment depends upon satisfactory performance of duties....
>
> . . . .
>
> Discipline and Discharge -- Administrative and supervisory personnel are charged to...discontinue the services of employees who do not reach agreed-upon standards of performance in accordance with rules and procedures that respect the rights of employees, and at the same time, permit the

> City and its administrative staff to properly discharge their responsibility to the citizens of this community. The principles embodied in the administration of discipline and discharge take cognizance of the dignity of the individual and will not demean him nor fall harshly upon any one.
>
> . . . .
>
> Rules of Personal Conduct--Listed below are actions which, among others depending upon circumstances, shall be considered grounds for disciplinary action. Disciplinary actions include verbal reprimand, formal written reprimands, suspension and discharge.

Thirty-five grounds for discipline are listed under the "Rules of Personal Conduct."

The Applicant's Statement attached to the plaintiff's employment application reads in part:

> This application for employment shall be considered active for a period of time not to exceed 45 days. Any applicant wishing to be considered for employment beyond this time period should inquire as to whether or not applications are being accepted at that time.
>
> I hereby understand and acknowledge that, unless otherwise defined by applicable law, any employment relationship with this organization is of an "at will" nature, which means that the Employee may resign at any time and the Employer may discharge Employee at any time with or without cause. It is further understood that his "at will" employment relationship may not be changed by any written document or by conduct unless such change is specifically acknowledged in writing by an authorized executive of this organization.

The pretrial order stipulates that the plaintiff read and signed the Applicant's Statement. The plaintiff argues that the at will

employment provision in the Applicant's Statement is not operative on the ground that the application, by its terms, was no longer valid or effective when she was hired over eight months later. The fact that the City would consider the application active for only forty-five days does not preclude the City from reactivating the application for the purpose of filling the same position that subsequently becomes available again, as in this cause.[1] It is implicit that the application merely becomes inactive rather than void. Charles Richardson, the City Personnel Director, testified in his deposition that the Applicant's Statement is obtained from all employees of the City and the plaintiff stated in her deposition that she was not asked to complete an updated application:

> Q. Were you ever advised that you needed to fill out another application?
> A. No, unh-unh. That's the one I was hired on (referring to the October 14, 1991 application).
> Q. So this is the one and only and the application on which you were hired?
> A. As far as I know.

The Applicant's Statement expressly provides that "unless otherwise defined by applicable law, any employment relationship with this organization is of an 'at will' nature (emphasis added)." The court finds that the Applicant's Statement, along with the

[1]According to the plaintiff's deposition testimony, O'Neal explained that the animal control officer had "walked out" and the position needed to be filled as soon as possible.

plaintiff's application, was the basis of the City's hiring decision.[2]

The disclaimer provision in the Applicant's Statement provides that the "'at will' employment relationship may not be changed by any written document or by conduct unless such change is specifically acknowledged in writing by an authorized executive of this organization." The plaintiff contends that the City's employee handbook altered the terms of her employment and created a "for cause" standard for terminating an employee. In 1985 the Mississippi Supreme Court held that

> a written contract can be modified by a policy handbook which then becomes part of the contract, but only where the contract expressly provides that it will be performed in accordance with the policies, rules and regulations of the employer.

Perry, 508 So.2d at 1088 (construing Robinson v. Board of Trustees,

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[2]The plaintiff complains that the at will language "tucked into the 'Applicant's Statement' at the end of the employment application is not highlighted or in bold face or made to stand out in any way." In Perry the employee handbook contained a disclaimer in boldface type and the employment agreement contained an express statement apparently in regular typeface. 508 So.2d at 1088, cited in Bobbitt, 603 So.2d at 362. The plaintiff cites no authority holding that the print must be highlighted or boldface in order to be effective. A claim for breach of contract has been precluded in actions in which the employer's disclaimer was not highlighted. E.g., Solomon v. Walgreen Co., 975 F.2d 1086 (5th Cir. 1992); Shaw v. Burchfield, 481 So.2d 247 (Miss. 1985). The pertinent language in the Applicant's Statement set forth in a separate paragraph is straightforward and not buried in fine print. The court finds that the lack of highlighting or boldface is of no significance. In any event, the phrase "at will" is set apart by its enclosure in quotation marks.

477 So.2d 1352, 1353 (Miss. 1985)). Contrary to the manual provision for termination after the commission of three major offenses, the plaintiff in Bobbitt was terminated for one incident of insubordination defined as a major offense. 603 So.2d at 359, 360. The court held that absent a provision in an employment contract to the contrary, an employer, who publishes and disseminates a manual setting forth procedures for employees' infractions of rules, "will be required to follow its own manual in disciplining or discharging employees for infractions or misconduct specifically covered by the manual." Id. at 357, 361. The court in Bobbitt predicated its holding on the fact that there was "no express disclaimer or contractual provision that the manual did not affect the employer's right to terminate the employee at will." Id. at 362. The instant cause is clearly distinguishable in that the plaintiff expressly acknowledged in the Applicant's Statement that her employment relationship with the City would be of an "at will" nature.

In determining whether the handbook altered the plaintiff's at will status, the issue in part is whether the language in the handbook creates an implied contractual right to dismissal for good cause or for certain specified causes. The list of possible grounds for disciplinary action, ranging from verbal reprimand to discharge, under "Rules of Personal Conduct" is expressly not all-inclusive. In contrast, the employee manual in Bobbitt specified

the degrees of violations and the corresponding disciplinary measure to be imposed for a specific violation. 603 So.2d at 359-360. For example, the handbook states that "[a] third Major Offense will result in dismissal of the employee." Id. at 360 (emphasis added). The Mississippi Supreme Court has rejected the argument that "the handbook's listing of reasons for discharge limited [the employer's] discretion to discharge [an employee] except for just cause." Hartle v. Packard Elec., 626 So.2d 106, 109-110 (Miss. 1993). The handbook in Hartle provided in part:

> Reasons for discharge may include dishonesty, willfull [sic] violation of instructions or Corporate Policy, insubordination, or refusal to comply with governmental requirements related to employment. In addition, conduct reflecting badly on the Corporation, even if it occurs away from the job, may be viewed as grounds for discharge.

Id. at 110. The court in Hartle quoted the Sixth Circuit as follows:

> We do not believe the listing of causes that "may result in the termination of your employment" in the Sears handbook detracted in any way from the language in the application or provided a reasonable basis for the conclusion that the plaintiff was employed under a "for cause" contract. The fact that certain acts were identified as conduct that might lead to discharge did not indicate that those acts were the exclusive permissible grounds for discharge.

Id. (quoting Reid v. Sears, Roebuck & Co., 790 F.2d 453, 460 (6th Cir. 1986)). The court in Hartle held that "the handbook did not

alter the at will status of the employment relationship." Id.

Similarly, the list of possible grounds for discipline in the City's handbook is expressly not exhaustive and does not preclude the City's right to terminate an employee for "a good reason, a wrong reason, or no reason." Otherwise, "a valid, express agreement [embodied in the Applicant's Statement] and a contradictory implied agreement [would] exist concerning the same subject matter at the same time." Perry, 508 So.2d at 1088. The other above-quoted provisions of the handbook pertaining to fair treatment of employees, continuation of employment based on satisfactory performance, and discharge of employees "who do not reach agreed-upon standards of performance," read in conjunction with "Rules of Personal Conduct," do not manifest an intent on the part of the City to waive its right to terminate an employee unilaterally. See Hartle, 626 So.2d at 109 (the employee handbook assured salaried personnel that its provisions would lead to a long-term relationship). In addition, the handbook does not constitute a change of the "at will" employment relationship "specifically acknowledged in writing by an authorized executive of [the City]," as required in the Applicant's Statement. The City retained its right to discharge an employee without cause through the express disclaimer in the Applicant's Statement signed by all employees, including the plaintiff, as matter of standard operating

procedure.[3] Therefore, the plaintiff has no breach of contract cause of action.

**B. Deprivation of Property Interest**

In order to maintain a cause of action for a violation of substantive or procedural due process rights on the basis of deprivation of property, the plaintiff must establish a property interest in or entitlement to continued employment. Moulton v. City of Beaumont, 991 F.2d 227, 230 (5th Cir. 1993); Ishee v. Moss, 668 F. Supp. 554, 557 (N.D. Miss. 1987) ("A protected property interest in employment exists only where the employee has an express or implied right to continued employment"). The plaintiff contends that the alleged practice of the City and the Humane Society of terminating employees for cause only gives rise to her property interest in continued employment. Personnel Director Richardson testified in his deposition that he is indirectly involved in the hiring and terminating of employees and attends board hearings on employee terminations. He further testified:

> Q. Have you ever been aware of the city firing an employee for no reason?

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[3]The plaintiff cites a Mississippi county court ruling denying a motion for summary judgment in a case involving the City of Tupelo's personnel handbook. McGloflin v. City of Tupelo, Civil Action No. 3393 (March 31, 1994). In McGloflin, an affidavit of the Director of the Public Works Department stated that all employees of his department are employed under "an oral agreement to serve for an indefinite term all at the will and pleasure of the [director]." There is no indication of any written agreement or written acknowledgement of an at will relationship as in the instant cause.

> A. No.
> Q. Is it a fair statement that when the City of Tupelo fires an employee, it's either because their services are not needed or that they have done something wrong that they should be fired for? Is that correct?
> A. That's correct.

The plaintiff argues that the alleged practice established a "mutually explicit understanding" that supports her claim of entitlement to continued employment. See Perry v. Sindermann, 408 U.S. 593, 601, 33 L.Ed.2d 570, 580 (1972) ("A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit"). Perry involved the de facto tenure claim of a nontenured college professor who had been employed for four successive years under a series of one-year contracts and had been a teacher in the state college system for six previous years. 408 U.S. at 594, 33 L.Ed.2d at 575. The United States Supreme Court found summary judgment in favor of the employer improper on the ground that "[a] teacher...who has held his position for a number of years, might be able to show...that he has a legitimate claim of entitlement to job tenure." Id. at 602, 33 L.Ed.2d at 580. The Supreme Court stated:

> We do not now hold that the respondent has any such legitimate claim of entitlement to job tenure. For "[p]roperty interests...are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law...."

Id. at 602 n.7, 33 L.Ed.2d at 580 n.7 (quoting Board of Regents v. Roth, 408 U.S. 564, 577, 33 L.Ed.2d 548, 561 (1972)).

Unlike the plaintiff in Sindermann, the plaintiff in the instant cause was employed for only approximately five and one-half months. The City's handbook refers to a one-year probationary period in the section pertaining to vacation eligibility. The plaintiff's understanding, according to her deposition testimony, that she was a probationary employee for only sixty to ninety days does not change the terms of the handbook. "[A] mere subjective 'expectancy' is [not] protected by procedural due process." Sindermann, 408 U.S. at 603, 33 L.Ed.2d at 580. Moreover, the fact that there may not have been previous employees who were discharged other than for cause cannot constitute a "mutually explicit understanding" as between the City and the plaintiff enforceable under Mississippi law.[4] See Batterton v. Texas General Land Office, 783 F.2d 1220, 1223-24 (5th Cir.) (practices contrary to state statute providing for at will employment cannot create a property interest in one's job), cert. denied, 479 U.S. 914, 93 L.Ed.2d 289 (1986). In Mississippi, an employer may have a good reason, wrong reason, or no reason for terminating an at will employee. Kelly, 397 So.2d at 875. The fact that the City may not

[4]In Sindermann, it was the circumstances surrounding the plaintiff's employment that raised the issue of whether a "mutually explicit understanding" between the plaintiff and defendant college president and board of regents supported the plaintiff's claim of entitlement to re-employment.

have previously terminated an employee for "no reason" does not mean that it could not have done so. LaBorde v. Franklin Parish School Bd., 510 F.2d 590, 593 (5th Cir. 1975) ("The mere fact that the school board may not have exercised its prerogative to terminate other teachers at the end of their [probationary period] does not negate their right under Louisiana law to follow that practice"). Under the at will doctrine, the City did not waive its right to terminate the plaintiff without cause. The City's[5] past practice with other at will employees cannot be the basis of an implied contract with the plaintiff that would create a property interest in continued employment. As an at will employee, the plaintiff has no constitutionally protected property interest in her employment and therefore has no cause of action for violation of substantive or procedural due process rights under the Fourteenth Amendment, with regard thereto.

**C. Breach of Implied Duty of Good Faith**

In Hartle the Mississippi Supreme Court held that the plaintiff's at will employment relationship did not impose a duty on the defendant employer to terminate the plaintiff only on the basis of good faith. 626 So.2d at 110. The court reaffirmed its

[5]The plaintiff also contends that the Humane Society, according to Dana Carver, president of the Humane Society, had similarly discharged previous employees for cause only. The court's conclusion regarding the City's previous discharges holds true for those of the Humane Society. In any event, the Humane Society was not the plaintiff's employer at the time of her discharge.

rationale in Perry that "at-will employment relationships are not governed by an implied covenant of good faith and fair dealing." 626 So.2d at 110. The court in Perry noted that only a few states have adopted the theory of the implied covenant of good faith and fair dealing whereby "[a]ny breach of this implied covenant by malicious termination or harassment is said to give the victim a tort action for wrongful discharge." 508 So.2d at 1089, quoted in Hartle, 626 So.2d at 110. The at will provision in the Applicant's Statement attached to the plaintiff's application would fall within the exception to the minority rule, even if it were applied in Mississippi, as in Perry:

> Even if Mississippi were to adopt such a rule, however, Perry would probably not prevail under it. California and Montana both hold that where the employee has signed an explicit agreement that he can be terminated at will, and [sic] action under the implied covenant for good faith and fair dealing is precluded.

508 So.2d at 1089, quoted in Hartle, 626 So.2d at 110. Therefore, this claim against either the City or the Humane Society[6] is precluded.

**D. Interference with Economic Relations**

The plaintiff alleges that defendants O'Neal, the Humane

[6]The complaint and pretrial order allege that the Humane Society, as well as the City, violated the duty of good faith an employer owes an employee. The Humane Society was not the plaintiff's employer at the time of her alleged termination. In any event, the plaintiff does not specifically address this claim as against the Humane Society in response to the motion for summary judgment filed by O'Neal and the Humane Society.

Society and Sunshine Mills interfered with her economic relations with the City. Whether termed as interference with economic relations or employment relations, since the plaintiff was employed under a contract terminable at will,[7] the alleged tort is necessarily based on alleged interference with the plaintiff's contractual relations with the City. The Mississippi Supreme Court has held:

> A prima facie case of wrongful interference with a contract is made out if it is alleged (1) that the acts were intentional and willful; (2) that they were calculated to cause damage to the plaintiffs in their lawful business; (3) that they were done with the unlawful purpose of causing damage and loss, without right or justifiable cause on the part of the defendant (which constitutes malice); and (4) that actual damage and loss resulted.

Protective Service Life Ins. Co. v. Carter, 445 So.2d 215, 217 (Miss. 1983) (quoting Irby v. Citizens Nat'l Bank of Meridian, 121 So.2d 118, 119 (Miss. 1960)).

Defendants O'Neal and the Humane Society contend that since the plaintiff, as a city employee, was assigned to work for the Humane Society under O'Neal's supervision, they were in privity with the employment relationship between the plaintiff and the City and thus cannot be liable for interference:

> One who intentionally and improperly

[7]An oral or written contract of employment without a term of duration is terminable at will. Pinnix v. Babcock and Wilcox, Inc., 689 F.Supp. 634, 636, 637 n.4 (N.D. Miss. 1988).

> interferes with the performance of a contract between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for pecuniary loss resulting to the other from the failure of the third person to perform the contract....On the other hand, one occupying a position of responsibility on behalf of another is privileged, within the scope of that responsibility and absent bad faith, to interfere with his principal's contractual relationship with a third person.

Shaw v. Burchfield, 481 So.2d 247, 254-55 (Miss. 1985) (emphasis added). The court in Shaw stated:

> We note that numerous cases from other states recognize that there is no right of recovery on the part of a discharged employee against one said to have interfered with a contract terminable at will....These cases [proceed] on the premise that, where there has been no breach of contract, conceptualizing a tortious interference fails as a matter of elementary legal logic.

Id. at 255, quoted in Vestal v. Oden, 500 So.2d 954, 955 (Miss. 1986). In both Shaw and Vestal, the court, without accepting or rejecting this line of cases, resolved the issue on the ground of the good faith of the employer's agents. Vestal, 500 So.2d at 957; Shaw, 481 So.2d at 255.[8] In addition to ruling on the issues of breach of contract and implied duty of good faith in the context of an at will contract, the Mississippi Supreme Court later held in

[8]The plaintiff cites two unpublished memorandum opinions, Thompson v. City of Starkville, No. EC88-54-D-D and Bryan v. City of Columbus, No. EC89-220-S-D, that interpreted Shaw and Vestal as implicitly recognizing a cause of action for tortious interference with an at will employment contract. These rulings were based on an Erie guess and issued before the Hartle decision.

Hartle:

> The remaining issues raised by Hartle on appeal are devoid of merit and do not warrant discussion.

626 So.2d at 110. The remaining issues included the claim against the plaintiff's former supervisors for intentional interference with the existing employment contract and prospective business advantage. Id. at 108. In a case decided before Hartle, this court, construing Mississippi law, dismissed an at will employee's claim of tortious interference with employment relations. Pinnix v. Babcock and Wilcox, Inc., 689 F. Supp. 634, 637 (N.D. Miss. 1988). The court held:

> [I]f no enforceable contract existed, then any interference with that contract would be immaterial and does not represent a genuine issue for trial.

Id. The court further held:

> Choosing to terminate an at-will employee, even if based on personal animosity, would not have exceeded [the defendant supervisory employees'] responsibilities. An employer and its agents may terminate an employment at will contract for a good reason, a wrong reason, or no reason.

Id. Since an employer owes no duty of good faith to an at will employee, it would be incongruous to impose that same duty on the agents or representatives through whom the employer acts. Therefore, as a matter of law, O'Neal and the Humane Society are not subject to liability for tortious interference with the plaintiff's employment relationship with the City.

The plaintiff alleges that Sunshine Mills interfered with her economic relations with the City by demanding her termination without justification. Although Hartle involved the alleged tortious interference by supervisory employees, the ruling does not expressly distinguish between interference by supervisory employees and interference by an intervening third party. See Pinnix, 689 F. Supp. at 637 (any interference with an unenforceable employment contract is immaterial); Mid-Continent Telephone Corp. v. Home Telephone Co., 319 F. Supp. 1176, 1199 (N.D. Miss. 1970) (construing Mississippi law) ("An action for interference with contract will ordinarily lie when a defendant maliciously interferes with a valid and enforceable contract"). As noted by the Mississippi Supreme Court, "numerous cases from other states" do not recognize a right of recovery for interference with a contract terminable at will. Shaw, 481 So.2d at 255. E.g., Alam v. Reno Hilton Corp., 819 F. Supp. 905, 911 (D. Nev. 1993) ("An at-will employee relationship is not a contract with which a third party can interfere"); Hicks v. Clyde Federal Sav. & Loan, 696 F. Supp. 387, 389 (N.D. Ill. 1988) ("Since the court finds no [enforceable] contractual right existed, defendants cannot be held liable for tortious interference with contractual right").

The plaintiff alleges that the City breached the employment contract by terminating her and that Sunshine Mills tortiously interfered with that contract by demanding her termination. In

effect, the plaintiff alleges that Sunshine Mills interfered by inducing the City's breach of contract. Since the alleged termination does not constitute a breach of contract, the court finds that the alleged demand for such action cannot amount to tortious interference. See Shaw, 481 So.2d at 255 ("numerous cases from other states...[proceed] on the premise that, where there has been no breach of contract, conceptualizing a tortious interference fails as a matter of elementary legal logic"). The court finds that, under the current terminable at will rule in Mississippi, the interference claim against Sunshine Mills is not viable.

Even if Mississippi were to recognize tortious interference with an at will employment contract, it must be established that Sunshine Mills interfered "without right or justifiable cause." Vestal v. Oden, 500 So.2d at 957 (quoting Martin v. Texaco, 304 F. Supp. 498, 504 (S.D. Miss. 1969)). The plaintiff concedes that "Sunshine Mills may well have a 'legal, or social justification or excuse' to prevent substandard food from being transferred to the general public." (Plaintiff's memorandum brief at 33 (quoting 45 Am. Jur. 2d Interference § 3 (1969)). However, the plaintiff argues that Sunshine Mills had no such justification or excuse to demand her termination. Sunshine Mills contends that it undisputedly had a legitimate interest in the intended use of the dog food donated to the Humane Society. It further contends that, assuming arguendo that it did demand the plaintiff's termination,

it did so for the legitimate purpose of ensuring that the inferior dog food would not be made available to the public by the plaintiff in the future. The plaintiff asserts that Sunshine Mills could have made further donations on the condition that the Humane Society take certain precautions. Sunshine Mills' information, regardless of its accuracy, was that the Humane Society employees were allowed to take home surplus donated dog food only for the purpose of feeding shelter animals cared for at their homes. Sunshine Mills argues that, with the understanding that the plaintiff sold the food to the public without the Humane Society's consent or knowledge and in violation of the purported policy, it could not be certain that the plaintiff would be effectively supervised in the future. The court finds that, assuming arguendo that an interference claim could be maintained against Sunshine Mills, Sunshine Mills had a "justifiable interest and reason for acting." See Vestal, 500 So.2d at 957.

**E. Defamation**

The plaintiff alleges defamation against all the defendants. The elements of defamation are the following:

> (1) a false and defamatory statement concerning the plaintiff;
> (2) an unprivileged publication to a third party;
> (3) fault amounting at least to negligence on the part of the publisher; and
> (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

Blake v. Gannett Co., 529 So.2d 595, 602 (Miss. 1988) (quoting Chatham v. Gulf Pub. Co., 502 So.2d 647, 649 (Miss. 1987)). The issue of whether a statement is defamatory is governed by the common law definition of defamation as follows:

> Any written or printed language which tends to injure one's reputation, and thereby expose him to public hatred, contempt or ridicule, degrade him in society, lessen him in public esteem or lower him in the confidence of the community.

Id. at 603 (quoting Chatham, 502 So.2d at 650).

The defamation claim is based on statements made in news coverage of the circumstances surrounding the plaintiff's alleged termination. The plaintiff submitted two statements from individuals asserting that TV Channel 9 reported that the plaintiff stole dog food and that Sunshine Mills stated that it was "going to prosecute to the fullest extent of the law." A third individual stated in writing that she remembers news statements on Channel 9 about Vicky Mann and Sunshine Mills dog food and Sunshine Mills' statement that it was "going to prosecute to the fullest extent of the law." Defendants O'Neal and the Humane Society move to strike these statements on the ground that they do not constitute affidavits permissible under Rule 56(e) of the Federal Rules of Civil Procedure. Since the statements are not certified or notarized, the court finds that they are not properly before the court and should be stricken.

In the newscast of WTVA-Tupelo Channel 9 News on November 12,

1992,[9] the reporter stated:

> According to Humane Society officials, surplus dog and cat food donated by Sunshine Mills was occasionally given to employees of the shelter who had adopted animals. But at least one of these employees took the surplus food to flea markets and sold it. The money, according to an employee, was intended to be given back to the Humane Society to help the animals. But until today, Humane Society officials say they knew nothing about the food being sold to the public.

Dana Carver, president of the Humane Society, stated:

> We understand that there is an investigation going on and we're going to cooperate as much as we can with both Sunshine Mills and the police department.
>
> [In response to the reporter's question regarding any follow-up action]: There again, everything is in its infancy and as soon as we find out what the scope of the problem is we'll then act upon it. Until then, we'll just wait and see.

The reporter further stated:

> Sunshine Mills officials say they are shocked that their donations were being sold and plant manager Roy Turner issued this statement to WTVA News:
>
> > I would hope this would not affect what we do for the Humane Society but that decision will be left up to the president of the company who is out of town until Monday.
>
> Meanwhile, Humane Society officials say the money from the sold pet food, which they have been told by employees totals no more than $50.00, will be turned over to Sunshine Mills first thing tomorrow morning, yet the

[9] A copy of the transcript of this newscast was submitted as an exhibit.

> investigation continues.

On November 13, 1992 the same TV news station aired a follow-up newscast[10] wherein the reporter stated:

> A Tupelo-Lee County Humane Society employee was fired in connection with the selling of pet food donated by Sunshine Mills. Two other paid employees walked out. Vicky Mann was fired and returned $50.00 from sale proceeds.

Shelly Ellis, the plaintiff's attorney, stated:

> My client did not mean any harm to anybody. She was only trying to help the animal shelter out. She would, you know, wish to apologize to anybody if she had done them any harm. That was not her intent and at this point we're kind of weighing our options. There are, you know, possibilities out there and we're just looking to what they are right now. We're going to find out if there is an appeal process. If there is, we'll be looking into that.

Dana Carver stated:

> The community has always supported us in the past and we expect to have their support in the future and, again, the community can place all their trust in us. We do a good job.

The reporter stated:

> Sunshine Mills manager, Roy Turner, hopes Sunshine Mills will continue donating the food and added that Sunshine Mills desires to see Vicky Mann prosecuted for her actions.

On November 17, 1992 the Northeast Mississippi Daily Journal published an article referring to "a recent police investigation into alleged theft from the shelter." It reads in pertinent part:

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[10]The court has viewed the pertinent portion of the video.

> Dana Carver, president of the Tupelo/Lee Humane Society, said the investigation arose because a Humane Shelter employee was allegedly taking excess dog food donated to the shelter by Sunshine Mills and selling it.
>
> Carver said the employee involved was no longer working at the shelter as of last week.
>
> . . . .
>
> Jack Hill, director of the shelter, said Monday the shelter worked in conjunction with Sunshine Mills to develop internal controls to ensure that no such incident can happen again.
>
> . . . .
>
> Hill said of Sunshine Mills' donation "It just never entered anyone's mind that someone would take dog food."
>
> . . . .
>
> Darrell Smith, manager at the Sunshine Mills plant in Tupelo...said he regretted that the incident of the stolen dog food was widely reported because he feared it could injure the Humane Society's efforts to raise money for a new shelter.

It is important to note that the TV and newspaper media are not the defendants in this cause. Therefore, any statements made by the media are not the subject of the defamation claim. The following facts are stipulated in the pretrial order. The only agent, employee or representative of the Humane Society interviewed on the air by WTVA-Channel 9 News was Dana Carver. None of the news footage of interviews with Carver aired by WTVA-Channel 9 News mentioned the plaintiff's name, her employment position with the Humane Society, the state of her employment, or reasons for her separation from employment. O'Neal was not mentioned or interviewed in news footage aired by WTVA-Channel 9 News or in the newspaper article published by the Northeast Mississippi Daily

Journal. No representative of the City was mentioned or interviewed in news footage aired by WTVA-Channel 9 News or in the newspaper article published by the Northeast Mississippi Daily Journal.

The plaintiff asserts that, although the newspaper article does not mention her name, her identity was obvious in light of the TV newscasts aired less than one week prior to the publication of the article. The statements in dispute must be "false and clearly directed toward the plaintiff." Blake, 529 So.2d at 603. The Mississippi Supreme Court has repeatedly held that "the defamation must be clear and unmistakable from the words themselves and not be the product of innuendo, speculation or conjecture." Ferguson v. Watkins, 448 So.2d 271, 275 (Miss. 1984), quoted in Blake, 529 So.2d at 603. The plaintiff relies on the rule that the allegedly defamatory words "must be set in the context of the entire utterance." E.g., Lawrence v. Evans, 573 So.2d 695, 698 (Miss. 1990) ("[t]heir complexion draws color from the whole"). This rule mandates consideration of the entire utterance of the declarant as distinguished from the entire news report or the entire news coverage, i.e., the two TV news reports viewed in conjunction with the newspaper article. The court in Lawrence concluded:

> To be sure, we may not put Evans' words in the context of the entire article as we would if reporter Jacqueline Salit and the newspaper, The National Alliance, were the defendants.

Id. It would be unreasonable to look to the newscasts in order to

construe the article; the article is a separate and distinct news report containing no reference to the previous newscasts. The only newspaper statements attributable to the defendants that could be construed to be of a defamatory nature are Jack Hill's comment that "It just never entered anyone's mind that someone would take dog food" and Darrell Smith's reference to "the incident of the stolen dog food." To extrapolate the identification of the plaintiff from a previous TV newscast for the purpose of construing statements made in the article would have the effect of putting words in the declarants' mouths. Therefore, these comments are not clearly directed to the plaintiff in the context of the comments themselves or even in the context of the entire article. Nowhere in the newspaper article is the plaintiff's name mentioned. The court finds that the newspaper statements that can be attributed to the defendants do not defame the plaintiff.

The November 12, 1992 newscast does not identify the plaintiff and thus cannot be the subject of a defamation claim. The plaintiff is identified in the November 13, 1992 newscast as the Humane Society employee "fired in connection with the selling of pet food donated by Sunshine Mills." The only negative statement attributable to any defendant is the following:

> Sunshine Mills manager, Roy Turner...added that Sunshine Mills desires to see Vicky Mann prosecuted for her actions.

This is a mere expression of Sunshine Mills' opinion that the

plaintiff should be prosecuted for selling substandard dog food. See Meridian Star, Inc. v. Williams, 549 So.2d 1332, 1335 (Miss. 1989) ("Whether a statement constitutes an opinion is a question of law and is thus appropriate for resolution on a motion to dismiss"). "[S]tatements of opinion [relating to matters of public concern] are not absolutely privileged, but have First Amendment protection to the extent they have no 'provably false factual connotation.'" Woodmont Corp. v. Rockwood Center Partnership, 811 F. Supp. 1478, 1483 (D. Kan. 1993) (quoting Milkovich v. Lorrain Journal Co., 497 U.S. 1, 20, 111 L.Ed.2d 1, 18 (1990)).[11] The statement at issue clearly pertains to a matter of public concern, i.e., sale of dog food that was donated for use at a community animal shelter and not intended for public sale. Sunshine Mills' desire, as expressed by Turner, is clearly and unmistakably based on the disclosed and stipulated fact that the plaintiff sold dog food donated by Sunshine Mills. The referenced actions of the plaintiff pertain to her "selling of pet food donated by Sunshine Mills" as reported at the outset of the newscast. Turner's statement as reported is consistent with his affidavit stating in part that he told a TV reporter that "Sunshine Mills desired to see Vicky Mann prosecuted for having sold the dog food." The factual

[11]Woodmont Corp., like the instant case, involved nonmedia defendants. The Court in Milkovich expressly applied this standard to media defendants. Since falsity is required in any defamation case, the court finds this standard helpful in construing the statement at issue.

basis of Turner's statement, i.e., the plaintiff sold dog food donated by Sunshine Mills to the Humane Society, is not false. Therefore, the court finds that Turner's statement reported in the newscast is a protected expression of opinion that cannot give rise to a defamation claim.[12] In addition, it can be reasonably construed as an expression of Sunshine Mills' concern with any misuse of its donated dog food.

The plaintiff further alleges that the Humane Society and the City defamed her by advising the Mississippi Employment Security Commission [MESC] and the Monroe County Welfare Department that she quit her job. The plaintiff alleges that the City and/or the Humane Society initially advised the MESC that she was discharged. This allegation is based on the Notice of Nonmonetary Decision issued by the MESC on December 23, 1992 which states in part:

You were separated from your employment with

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[12]The actual malice standard (knowledge of falsity or reckless disregard for the truth) applies to a private individual's recovery of presumed and punitive damages for defamatory speech that pertains to matters of public concern or general public interest. Gertz v. Welch, Inc., 418 U.S. 323, 349, 41 L.Ed.2d 789, 810 (1974). In order to recover compensatory damages for actual injury, the plaintiff must prove at least negligence on the part of Sunshine Mills. Gertz, 418 U.S. at 347, 349, 41 L.Ed.2d at 809, 810; Blake, 529 So.2d at 602 (defamation claim requires proof of "fault amounting at least to negligence on the part of the publisher"). Even if the statement at issue were not construed as a constitutionally protected expression of opinion, there is no issue of material fact as to malice or even negligence on the part of Sunshine Mills. After inquiry with the police and the Humane Society, Sunshine Mills reasonably believed that the plaintiff had undertaken action for which she could be prosecuted, i.e., knowingly selling inferior dog food not intended for public sale.

> [the] City of Tupelo on November 13, 1992. Investigation reveals you were separated from this employment when the employer learned you had taken dog food away from the shelter and sold the food without authorization.

Personnel Director Richardson admitted in his deposition testimony that he advised the MESC of the above-quoted information furnished to him by the Humane Society. Separation from employment is not the equivalent of discharge. The parties even stipulated in the pretrial order: "The plaintiff <u>became</u> <u>separated</u> from her employment on or about November 13, 1992." Paragraph 8 (25) (emphasis added). Yet, the list of contested issues of fact in the pretrial order includes whether the plaintiff was "fired from her job." Paragraph 9 (14). In addition, a December 3, 1992 MESC Nonmonetary Report of Investigation, based on an interview with Jack Hill, the Humane Society Executive Director, on November 30, 1992, states in part: "[The plaintiff] was not fired. She quit."

However, the December 23, 1992 notice further states: "It is <u>determined</u> that you were discharged for misconduct connected with your work" (emphasis added). The MESC's determination cannot be attributed to the City or the Humane Society. It was the plaintiff herself who admittedly told the MESC that she was discharged. In fact, a MESC Request for Claims Information issued on December 10, 1992 reads in part: "Ask Claimant to rebut employer's statement that she walked out."

"Mississippi recognizes a tort of defamation relating to the

improper disclosure of the reason for termination." Gordon v. Tenneco Retail Service Co., 666 F. Supp. 908, 911 (N.D. Miss. 1987) (emphasis added).[13] In Gordon, the employer disclosed to the MESC that the plaintiff was fired for misconduct in her employment. The court found that such disclosure was privileged under Miss. Code Ann. § 71-5-131 (communication between employer and MESC "shall be absolutely privileged and shall not be made the subject matter or basis of any suit for slander or libel in any court of the State of Mississippi unless the same be false in fact and maliciously written, sent, delivered, or made for the purpose of causing a denial of benefits under this chapter"). Id. at 912. The Mississippi Supreme Court applied the privilege to a plaintiff's claim that his employer "maliciously defamed him before [the MESC] by stating he was fired for a 'bad attitude.'" McArn v. Allied Bruce-Terminix Co., 626 So.2d 603, 608 (Miss. 1993). The court concluded that the plaintiff failed to prove at trial that the statement was false and maliciously made. Id.

In order to recover for defamation, the statement must not only be false but also defamatory. The court finds that the statement that the plaintiff quit her job, even if false, is not a statement that would defame her character. "Defamation is a claim based on an injury to a person's reputation." Mize v. Harvey

[13]As previously noted, the alleged defamatory statements in the instant cause do not even pertain to the plaintiff's alleged termination.

Shapiro Enterprises, Inc., 714 F. Supp. 220, 224 (N.D. Miss. 1989) (construing Mississippi law). The complained of statement to the effect that the plaintiff voluntarily quit her employment is not one that would "expose [her] to public hatred, contempt or ridicule." Blake, 529 So.2d at 602. The Mississippi Supreme Court has stated:

> The threshold question is whether the statement made was defamatory....for if the statement was not defamatory, little else matters.

Fulton v. Mississippi Publishers Corp., 498 So.2d 1215, 1216 (Miss. 1986).

Even if Richardson's disclosure of the circumstances surrounding the plaintiff's separation from her employment were false, the court finds that there are no genuine issues of material fact as to malice. The plaintiff alleges that O'Neal gave her permission to sell the dog food. However, there is no evidence that such authorization was disclosed to Richardson, Hill, or any other Humane Society or City representative and the pretrial order stipulates that O'Neal did not communicate with any agent or employee of either agency. Therefore, any statements to the MESC were privileged under Miss. Code Ann. § 71-5-131.[14]

[14]Any statements made to the welfare department, even if defamatory, were similarly privileged since the plaintiff has presented no factual basis for a finding of malice. Gordon, 666 F. Supp. at 911 (Mississippi recognizes a defense of privilege when declarant has an interest in or duty with respect to communication to a person having a corresponding interest or duty "even though it

## F. Invasion of Privacy

The plaintiff alleges a state law claim of invasion of privacy against the Humane Society and the City under the false light theory. The plaintiff alleges that these defendants have placed her in a false light in the public eye as having wrongfully taken dog food from the animal shelter and selling it without permission. The Mississippi Supreme Court noted that four distinct theories of the invasion of privacy claim "have been generally recognized" as follows:

> (1) the intentional intrusion upon the solitude or seclusion of another;
> (2) the appropriation of another's identity for an unpermitted use;
> (3) the public disclosure of private facts; and
> (4) holding another to the public eye in a false light.

Deaton v. Delta Democrat Publishing Co., 326 So.2d 471, 473 (1976). The court apparently applied the theory of publication of private facts in Deaton. See Prescott v. Bay St. Louis Newspapers, Inc., 497 So.2d 77, 79 (Miss. 1986). The court in Prescott noted:

> Apart from acknowledging false light as one recognized theory of recovery, however, we have not confronted the question of whether we

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contains matter which without this privilege would be slanderous, provided the statement is made without malice and in good faith") (quoting Louisiana Oil Corp. v. Renno, 157 So. 705 (Miss. 1934)). The court in Gordon stated:

> A statement made within the scope of the privilege will be presumed to be in good faith absent a showing of actual malice.

666 F.Supp. at 911.

will recognize this theory.

Id. (emphasis in original).

Under the false light theory, the plaintiff must show only that "'he is given unreasonable and highly objectionable publicity that attributes to him characteristics, conduct or beliefs that are false.'" Id. at 80 (quoting Restatement (Second) of Torts § 652E Comment b). The plaintiff need not be defamed. Id. See Rinsley v. Brandt, 700 F.2d 1304, 1307 (10th Cir. 1983) (false light actions differ from defamation actions since recovery in false light actions is for mental distress rather than injury to reputation), cited in Prescott, 497 So.2d at 80. The court in Prescott expressly declined to resolve the question regarding recognition of the false light theory since the plaintiff did not meet his burden of "'identifying particular statements or passages that are false and invade his privacy.'" Prescott, 497 So.2d at 80, 81 (quoting Rinsley, 700 F.2d at 1310).

Accordingly, the Fifth Circuit, in construing Mississippi law, has refused to apply the false light theory to an invasion of privacy claim. Mitchell v. Random House, Inc., 865 F.2d 664 (5th Cir. 1989). The court reasoned:

> Mississippi has never expressly or impliedly adopted the "false light" tort or allowed recovery in a case of this kind on other than a defamation theory. We accordingly decline to adopt for Mississippi Mitchell's false light theory. Moreover, it appears rather doubtful to us that Mississippi, having quite recently "refined" its law so as, in

> substance, to restrict libel recovery for false noncommercial writings concerning the plaintiff by mandating "strict" enforcement of a requirement that the "defamation be clear and unmistakable from the words themselves and not the product of innuendo," would now in effect significantly undercut that refinement by allowing almost identical tort recovery, but with a substantially diluted standard of defamation, merely because a different name has been attached to the claim.

Id. at 672 (emphasis in original). The court finds that the plaintiff' false light claim is not cognizable under Mississippi law and thus cannot withstand the motions for summary judgment.

**G. Liberty Interest**

The plaintiff alleges that the City and the Humane Society violated her constitutional liberty interests.[15] It is well settled:

> In order to establish the deprivation of a liberty interest, the employee may show... that she was terminated without notice and an opportunity to be heard for a reason which was (i) false, (ii) stigmatizing and (iii) published....

Moore v. Mississippi Valley State University, 871 F.2d 545, 549 (5th Cir. 1989). The aggrieved employee must show that "the government agency has made...stigmatizing charges public 'in any official or intentional manner.'" Wells v. Hico Indep. School Dist., 736 F.2d 243, 256 (5th Cir. 1984) (quoting Ortwein v.

[15]Only the City may be liable for violation of the plaintiff's constitutional right since the Humane Society was neither the plaintiff's employer at the time of her alleged discharge or a public or governmental agency.

Mackey, 511 F.2d 696, 699 (5th Cir. 1975)), cert. dismissed, 473 U.S. 901, 87 L.Ed.2d 672 (1985). "It is well established that discharge from public employment under circumstances that put the employee's reputation at stake" gives rise to the constitutionally protected liberty interest. Dubose v. Oustalet, 738 F. Supp. 188, 190 (S.D. Miss. 1990). Dubose involved public disclosure regarding sexual harassment allegations against the Motor Vehicle Commission Director and the questionable investigation conducted by the Commission Chief Investigator. A commission employee informed local newspapers and television stations of the nature of the charges. Id. at 189. The court in Dubose concluded that publication by the defendant commission members and chairman was an essential element of the liberty interest claim. Id. at 192. The court held that the employee's actions "cannot be attributed, as a matter of law, to defendants, as there can be no vicarious or respondeat superior liability under section 1983." Id.

The parties stipulated in the pretrial order that no representative of the City was mentioned or interviewed in the news coverage. Since the City, like the public employer in Dubose, did not make public any statements regarding the plaintiff's purported termination, the court finds that this constitutional claim has no merit.

**H. Malicious Prosecution**

The plaintiff alleges the state law claim of malicious

criminal prosecution against Sunshine Mills. The elements of malicious prosecution are as follows:

> (1) the institution or continuation of original judicial proceedings, either criminal or civil;
> (2) by, or at the insistence of the defendants;
> (3) the termination of such proceeding in plaintiff's favor;
> (4) malice in instituting the proceeding;
> (5) want of probable cause for the proceedings; and
> (6) the suffering of damages as a result of the action or prosecution.

Page v. Wiggins, 595 So.2d 1291, 1293 (Miss. 1992). The affidavit of Roy Turner, Assistant Plant Manager of Sunshine Mills, states in pertinent part:

> (1) He learned that Sunshine Mills dog food was being sold at Lynn's Discount Grocery and a flea market below Sunshine Mills' wholesale prices;
>
> (2) At Lynn's Discount Grocery, he recognized markings used by Sunshine Mills to designate food not intended for sale;
>
> (3) At that time he believed a Sunshine Mills employee was stealing Sunshine Mills products and providing them to Lynn's Discount Grocery and possibly others for sale to the public;
>
> (4) On or about November 12, 1992 he requested Detective Cliff Hardy of the Tupelo Police Department to begin an investigation at which time he had "no idea or

indication" that the Humane Society or specifically the plaintiff was the possible source; and

(5) On November 12 or 13, 1992 he first heard of the plaintiff whom Detective Hardy identified as a Humane Society employee who had furnished the donated dog food to Lynn's Discount Grocery.

Turner also testified in his deposition that it was Detective Hardy who informed him that a Humane Society employee was taking dog food. The affidavit of Detective Cliff Hardy states in pertinent part:

(1) He was involved in the investigation that resulted from a telephone call from Turner on or about November 12, 1992;

(2) Turner did not mention the plaintiff's name and told him that he thought the source was probably a Sunshine Mills employee stealing its products;

(3) He learned that the daughter of the owner of Lynn's Discount Grocery, the plaintiff, worked at the Humane Society;

(4) The plaintiff voluntarily went to the Detective Office for questioning and was read her Miranda rights before any questioning;

(5) Sunshine Mills did not request that the plaintiff be arrested and she was not arrested.

The pretrial order stipulates that the plaintiff was not formally charged with a crime, required to post bond or placed in jail, and no civil proceeding was instituted by Sunshine Mills against the plaintiff. The plaintiff's allegation that Sunshine Mills filed a complaint of theft and unauthorized sale of its dog food is unsupported by any evidence. In any event, the plaintiff does not allege that the complaint targeted her.

The first element of malicious prosecution is the institution of a criminal proceeding. Sunshine Mills' request for an investigation does not constitute the institution of a criminal proceeding. Sunshine Mills did not file an affidavit against the plaintiff and no formal charges were brought against the plaintiff. Cf. C & C Trucking Co. v. Smith, 612 So.2d 1092, 1097 (Miss. 1992) (criminal proceedings for embezzlement instituted by affidavit charging the plaintiff with a felony); Owens v. Kroger Co., 430 So.2d 843, 845 (Miss. 1983) (plaintiff was arrested for shoplifting and acquitted). The plaintiff further alleges that Sunshine Mills caused the plaintiff to be arrested at her place of employment and to be interrogated for an extended period of time. The Mississippi Supreme Court has held:

> An arrest within the meaning of the criminal law is the taking into custody of another person by an officer or a private person for the purpose of holding him to answer an alleged or suspected crime....One who voluntarily accompanies an officer to a place where he may be interviewed is not under an arrest.

Smith v. State, 229 So.2d 551, 556 (Miss. 1969). Detective Hardy's affidavit states that the plaintiff "voluntarily came to the Detective Office for questioning." Since the plaintiff does not contest this statement, the court finds that the plaintiff was not in fact arrested. Even if the plaintiff were deemed to have been arrested, the plaintiff produces no evidence that raises an issue of material fact as to institution of a criminal proceeding by, or at the insistence of Sunshine Mills.

In Page the defendant signed an affidavit charging the plaintiff with shoplifting resulting in an arrest warrant and the setting of a misdemeanor bond. 595 So.2d at 1292. A hearing was held and the shoplifting charges were dismissed for the defendant's failure to make an in court identification. Id. In addressing the elements of the malicious prosecution claim, the court found:

> Obviously, there was institution of criminal proceedings against Page, by, or at the instance of, Wiggins who executed an affidavit against Page, and the termination of such proceedings in Page's favor.

Id. at 1293. No charges were filed against the plaintiff in the instant cause and mere questioning of the plaintiff during the course of an investigation does not amount to an institution of a criminal proceeding. The court finds that the plaintiff has no cause of action for malicious prosecution against Sunshine Mills.

**H. Menace**

The plaintiff alleges a state law claim of menace against

Sunshine Mills on the ground that Sunshine Mills threatened to prosecute her and have her placed in jail. The only evidence other than the three statements that will be stricken is the TV news report that Sunshine Mills' manager, Roy Turner, stated that "Sunshine Mills desires to see Vicky Mann prosecuted for her actions." Turner stated in his affidavit that he did tell the TV reporter that "Sunshine Mills desired to see Vicky Mann prosecuted for having sold the dog food." Such an intent does not constitute the tort of menace. Even a threat of prosecution alone would not amount to menace.

Without objection from the plaintiff, Sunshine Mills cites Miss. Code Ann. § 97-3-81 which reads in pertinent part:

> Every person who shall knowingly send...any letter or writing...threatening therein to accuse any person of a crime or to do any injury to the person or property of any one, with a view or intent to extort or gain money or property of any description belonging to another, shall be guilty of an attempt to rob, and shall, on conviction be punished by imprisonment in the penitentiary not exceeding five years.

Similarly, the plaintiff in a civil action for menace alleged violation of this statute. Dennis v. Travelers Ins. Co., 234 So.2d 624, 625, 626 (Miss. 1970) (action barred under the statute of limitations applicable to intentional torts including menace; plaintiff cannot escape the limitations bar "by the mere refusal to style the cause brought in a recognized statutory category and thereby circumvent prohibition of the statute"). The statute

clearly pertains to criminal charges. E.g., Smith v. State, 172 So. 132 (Miss. 1937); State v. Ricks, 66 So. 281 (Miss. 1914).

The plaintiff relies on the definition of the word "menace" as "a show of intention to inflict harm: a threatening gesture, statement, or act...." Dennis, 234 So.2d at 626 (quoting Webster's International Dictionary, 3rd ed.). However, Dennis did not involve a mere threat. The court found that a letter threatening criminal prosecution to enforce payment of damages for vandalism falls within the category of menace. Id. Like its criminal counterpart of attempted robbery or extortion, the tort of menace requires a threat made for the purpose of coercing the plaintiff into taking certain action, as reflected in the pertinent issue of fact delineated in paragraph 9 of the pretrial order:

> (8) Did Sunshine Mills threaten to take improper action against Mann unless she acted in a particular manner demanded by Sunshine Mills?

There is no genuine issue of material fact as to whether Sunshine Mills made any demands for any action on the part of the plaintiff under threat of prosecution. There is no evidence that Sunshine Mills even threatened to prosecute the plaintiff. Therefore, the plaintiff cannot prevail on this claim, as a matter of law.

**I. Infliction of Emotional Distress**

Damages for emotional distress are not recoverable for negligence unaccompanied by a medically cognizable physical injury or illness for which treatment is required. Sears, Roebuck & Co.,

405 So.2d 898, 902 (Miss. 1981), cited in Campbell v. Beverly Enterprises, 724 F. Supp. 439, 440 (S.D. Miss. 1989). The plaintiff alleges intentional or negligent infliction of emotional distress by all the defendants in the pretrial order but addresses only their alleged intentional infliction of emotional distress. "To recover for intentional infliction of emotional distress, the defendants' conduct must evoke 'outrage or revulsion.'" Mitchell, 865 F.2d at 672 (quoting Sears, Roebuck & Co., 405 So.2d at 902). In other words:

> The inquiry focuses on the conduct of the defendant rather than the physiological condition of the plaintiff. "[I]t is the nature of the act itself -- [not] the seriousness of [its] consequences -- [that] gives impetus to legal redress."

Jenkins v. City of Grenada, 813 F. Supp. 443, 446 (N.D. Miss. 1993) (quoting Sears, Roebuck & Co., 405 So.2d at 902). The Fifth Circuit, construing Mississippi law, has stated:

> It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.

White v. Walker, 950 F.2d 972, 978 (5th Cir. 1991) (quoting Restatement (Second) of Torts § 46 Comment d). The fourteen-year-

old plaintiff in White was stopped by a police officer while driving his parents' car without a license. 950 F.2d at 974. The court held that the police officer's statement to the passengers not to associate with the plaintiff and statement to the plaintiff that his keys were being impounded "for grand auto theft" were not outrageous. Id. at 978. See Burris v. South Central Bell Telephone Co., 540 F. Supp. 905, 907, 909 (S.D. Miss. 1982) (phone company employee's statement to the plaintiff that he would be "turned in for fraud" did not constitute intentional infliction of emotional distress).

The plaintiff alleges that "the most outrageous and revulsive conduct of [O'Neal and the Humane Society] is their mad dash to initiate 'damage control' -- at the obvious expense of [the plaintiff's] job, reputation and rights." Even if these defendants were motivated by damage control in order to preserve community support, particularly Sunshine Mills' support in the form of dog food donations, such damage control, resulting in what the plaintiff perceives as unfair termination and publicity, does not rise to the level of revulsion. In fact, the plaintiff sold dog food which she knew was inferior and unsuitable for public sale.[16] The plaintiff's allegation that O'Neal knew of and acquiesced in the sales does not raise an issue of material fact as to O'Neal's

[16]According to her deposition testimony, the plaintiff knew that neither her animals nor O'Neal's animals would eat the donated food.

alleged intentional infliction of emotional distress, in light of the fact that O'Neal undisputedly told detectives that the plaintiff did not steal the food. Any concealment on the part of O'Neal with respect to her alleged acquiescence would be consistent with damage control for the sake of the Humane Society and does not "go beyond all possible bounds of decency." That same allegation does not raise an issue of material fact as to liability on the part of the Humane Society or the City in the absence of any evidence that these defendants knew of O'Neal's alleged consent to the sale. Similarly, Sunshine Mills was advised that the plaintiff's sale of its donated dog food was unauthorized. The court finds that Sunshine Mills' alleged demand for the plaintiff's termination does not rise to the level of outrageous conduct.

Independent of the plaintiff's alleged wrongful termination, there is no evidence that any public statements made by any of the defendants defamed her. No defendant publicly stated that the plaintiff stole the dog food. The overall impact of the TV coverage followed by the newspaper article is not within the responsibility of any of the defendants. The court finds that no alleged conduct on the part of any of the defendants constitutes intentional or negligent infliction of emotional distress.[17]

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[17] The plaintiff has no cause of action for negligent infliction of emotional distress based on the alleged defamatory statements covered in news reports. The Fifth Circuit in Mitchell concluded:

> There is no Mississippi precedent to

## IV. Conclusion

For the foregoing reasons, the court finds that there are no genuine issues of material fact as to any of the plaintiff's claims and that the defendants are entitled to summary judgment, as a matter of law.

An order will issue accordingly.

THIS, the _____ day of March, 1995.

_____
**NEAL B. BIGGERS, JR.**
**UNITED STATES DISTRICT JUDGE**

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> support Mitchell's claim for negligent infliction of emotional distress based upon a written noncommercial publication. We will not create this tort for Mississippi.

865 F.2d at 672.